No. 12-2273

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPLETON PAPERS, INC.,

Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENT AND NATURAL RESOURCES DIVISION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLEES

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STATEMENT OF JURISDICTION

The jurisdictional summary in the appellant's brief is complete and correct.

STATEMENT OF THE ISSUES

Whether the district court correctly held that technical reports and related materials prepared by consultants for Justice Department attorneys in anticipation of CERCLA litigation are protected from disclosure under Exemption 5 of the Freedom

of Information Act because they are litigation work product and therefore are not routinely or normally disclosed in civil litigation.

STATEMENT OF THE CASE

Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, the United States has participated in extensive litigation concerning environmental damage to an area of Wisconsin known as the Lower Fox River and Green Bay Superfund site (the "Fox River Site"). The United States has been represented by the Environment and Natural Resources Division of the Department of Justice. To assess the situation and formulate litigation positions, Justice Department attorneys have employed technical experts to prepare environmental reports. Plaintiff, Appleton Papers, Inc. ("API"), is one potentially responsible party who is the subject of CERCLA litigation and has sought but been denied those reports through civil discovery.

After a district court denied API's discovery request, API sought to obtain these reports, as well as related drafts and supporting materials, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Justice Department has turned over certain documents but withheld others, based on two of FOIA's Exemptions: (1) Exemption 5, because they are covered by the work-product and deliberative process privileges, and (2) Exemption 7(A), because production "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A).

API then commenced this suit to compel disclosure of the remaining records.[1] The district court granted the agency's motion for summary judgment, ruling that the records in question were protected by the attorney work-product privilege and therefore properly withheld under Exemption 5 of the FOIA. This appeal followed.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, strikes a "'workable balance between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966)). Thus, the Act generally "provide[s] for open disclosure of public information" but "recognizes" through nine statutory exemptions that certain "disclosure is not always in the public interest." *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982). "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information, and therefore provided the specific exemptions under which disclosure could be refused." *John Doe Agency*, 493 U.S. at 152 (internal quotation marks omitted). These exemptions "are intended to have meaningful reach and

[1] API also sought to compel production of documents produced by the Environmental Protection Agency relating to the cleanup at the Site. The EPA records are not at issue in this appeal. Br. 12.

application." *Ibid.*; see, *e.g.*, *Solar Sources* v. *United States*, 142 F.3d 1033, 1037 (7th Cir. 1998); *Manna* v. *Dep't of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995).

As relevant here, Exemption 5 of the FOIA protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 protects any document "normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see also *United States.* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984) (materials covered by Exemption 5 if a privilege "preclude[s] routine disclosure"); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 26 (1983) (no FOIA disclosure requirement for documents that would not be "routinely" or "normally" disclosed in litigation "upon a showing of relevance"). The exemption thus incorporates several different privileges including the deliberative process privilege, attorney-client privilege, and, as relevant here, work-product privilege. See *Grolier*, 462 U.S. at 23.

In contrast to civil litigation, in which a court must often weigh a party's interest in disclosure against the interests protected by a privilege, FOIA exemptions apply without regard to the identity of the FOIA requester and a court does not balance the asserted interests of the requester against the government's interest in confidentiality. See *Grolier*, 462 U.S. at 26; see also *Williams & Connolly* v. *SEC*, 662

F.3d 1240, 1243, 1245 (D.C. Cir. 2011); *Rockwell Int'l Corp.* v. *DOJ*, 235 F.3d 598, 606-07 (D.C. Cir. 2001).

II. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

A. The Underlying Litigation

Paper production facilities and paper coating facilities located along the Lower Fox River have released polychlorinated biphenyls ("PCBs") that have polluted a 40-mile stretch of the river and more than 1000 square miles of Green Bay, known as the "Fox River Site." Dkt 14, at 3. The cleanup of PCBs is estimated to take years and cost "something on the order of one billion dollars." SA1. Appleton Papers, Inc. ("API"), the plaintiff here, has been named as a potentially responsible party. SA1-2.

The United States, working with the State of Wisconsin, has filed several enforcement actions against parties that have contributed to the contamination of the Fox River Site under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et. seq.*. See Dkt. 14, at 4-5; Dkt. 15, at 5. These parties include API, which has asserted counterclaims against the United States, based on, amongst other things, activity by the Army Corps of Engineers. See Dkt. 14, at 4, 5, 6.

"In preparation" for various rounds of CERCLA litigation, the Department of Justice retained the services of environmental engineering contractors who "produced draft reports and other documents for the government's use in litigation." SA2.; see

Dkt. 14, at 9-10. These materials provided, amongst other things, "technical advice regarding the sources of PCBs at the Fox River Site." Dkt. 14, at 9.

Justice Department attorneys have used these analyses and interim reports for a variety of purposes, including "to inform the United States' civil enforcement litigation strategy and inform decisionmakers regarding proposed settlements and other litigation-related decisions." Dkt. 15, at 3. As relevant here, Justice Department attorneys offered rough estimates of PCB discharges in support of consent decrees with the Fort James Operating Company and Georgia Pacific Consumer Products LP. See Dkt. 18-4, at 25, 44; Dkt. 18-5, at 24, 27. The government estimated that 15%-20% of PCB discharge came from a particular industrial facility operated by those companies. See *ibid.* The reports and materials relied on by government attorneys in this regard which are at issue here have never been submitted or even identified in the government's CERCLA litigation filings.[2]

In 2011, API sought to obtain copies of the materials and reports prepared by the United States for the CERCLA litigation after the United States entered into a consent decree with Georgia-Pacific. See Order Approving Consent Decree at 1, *United States* v. *NCR Corp.*, No. 10-C-910, ECF No. 130, at 1 (E.D. Wis.). API

[2] The Justice Department has additionally shared two documents from 2000 and 2001, concerning estimates of PCB discharge, with opposing parties as part of settlement discussions. These documents were provided to API in response to its FOIA request. Dkt. 14, at 11-12; Dkt. 15, at 3-4.

objected to the consent decree and asked the district court to compel production of documents relating to the share of PCB discharges at the Fort James site, including the documents at issue here. *Id.* at 9. The district court denied API's motion. The court explained that the 15%-20% figure cited by the government in that case had not "come out of left field" but rather was supported by multiple "estimates in the record, and is consistent with the objectors' own expert." *Id.* at 5. The court also explained that that discovery would not affect its approval of the settlement. *Ibid.*

B. The FOIA Request

In 2010, API submitted a FOIA request for (1) full and draft versions of a report prepared for the United States by Amendola Engineering, and "[a]ny and all supporting documentation"; (2) an unnamed "report, as well as any drafts, by the United States' technical consultant"; and (3) "[a]ny and all supporting documentation"; and "[a]ny and all other reports or analysis, as well as any drafts" and "all supporting documentation" concerning estimates of PCB discharges to the Fox River "that were prepared by, or on behalf of, the United States" since May 10, 2000. Dkt. 14, at 6-7.[3]

Attorneys working on the Fox River litigation searched for responsive documents, dividing them into categories based on which consulting firm produced

[3] API also requested all EPA documents concerning remedial design plans for Fox River. API has not appealed that district court's decision concerning EPA documents. Br. 12.

the materials. Dkt. 14, at 9-12. Justice Department attorneys determined that 101 of the documents are covered by the work-product privilege and therefore exempt under FOIA exemption 5. Dkt. 14, at 13. "The materials withheld as work product consist of attorney communications with, or records or analysis prepared by, litigation consultants for the use of government attorneys." Dkt. 14, at 13-14. They were "created in anticipation of litigation" against API and others, as well as for the counterclaims against the United States. Dkt. 14, at 14.

The Justice Department released certain materials, including two documents from 2000 and 2001 concerning estimates of PCB discharge that had been provided to other parties as part of settlement discussions. Dkt. 14, at 11-12; Dkt. 15, at 3-4.

C. District Court Decision

API then commenced this action against the Department of Justice and EPA, seeking to compel disclosure of additional documents. The district court granted summary judgment for the government, holding that the requested documents were work product properly withheld under FOIA Exemption 5. SA4. The court explained that the Justice Department documents "consist of technical reports, drafts, data, and other communications about those reports" that were "prepared in anticipation of litigation." SA5. The court found no basis for API's contention that the work-product privilege applies only to "attorney opinions or impressions" and does not apply to "purely factual material." *Ibid.*

The court similarly found no basis for API's argument that the government had waived the work-product privilege for the requested documents because when requesting approval of two consent decrees, it had offered estimates of PCB discharge based in part on work by its technical consultants. SA8-9. The court observed that the new Federal Rule of Evidence Rule 502(a) had abolished "the dreaded subject-matter waiver" in civil litigation and requires disclosure of information at trial only in ""situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner,' a circumstance the notes suggest would be an 'unusual' situation." SA9. The district court reasoned that the government's reference to its consultants' work has been "only in passing and certainly not in order to make a dispositive point." *Ibid.*

For these reasons, the court held that all of the records the Department withheld are protected from disclosure under the attorney work-product privilege of FOIA Exemption 5. Because the court resolved the case on the basis of the attorney work-product privilege, it had no occasion to pass upon the other exemptions relied on by the government, including the deliberative process privilege and the law enforcement records privilege.[4]

[4] The district court also granted summary judgment to the government with respect to the EPA documents. SA11. API, however, has not renewed those claims on appeal.

SUMMARY OF ARGUMENT

The district court correctly held that the documents at issue in this appeal are litigation work product and therefore protected from disclosure under FOIA Exemption 5. The documents were prepared by consultants, working with Justice Department attorneys, in preparation for litigation. API is mistaken that factual material can be separated from the documents. The work-product privilege covers the documents themselves, including factual and analytical material.

API is similarly mistaken that the United States waived the work-product privilege by stating in litigation its understanding of the Fox River environmental situation, an understanding based in part on work by technical consultants. API invokes case-specific situations in which privileged work product may be admitted in court to ensure an even-handed presentation of evidence. But those fact-bound situations have no relevance to the inquiry under Exemption 5 of FOIA, which turns on whether materials are *normally* or *usually* discoverable and not on whether there are fact-specific exceptions to normal discovery rules that can result in disclosure in particular factual circumstances in non-FOIA litigation. In any event, API not shown any reason that the government has waived the work-product privilege with respect to a set of documents that have not been made public.

STANDARD OF REVIEW

This Court deploys a two-step standard when reviewing a district court's disposition of a FOIA case on summary judgment. First, it asks whether the district court had a sufficient factual basis for its ruling. *Enviro Tech Int'l, Inc.* v. *United States*, 371 F.3d 370, 373 (7th Cir. 2004). In so inquiring, the Court can rely solely on the government's affidavits, *Patterson* v. *IRS*, 56 F.3d 832, 836 (7th Cir. 1995), or, when available, a *Vaughn* index. *Wright* v. *OSHA*, 822 F.2d 642, 645-46 (7th Cir. 1987). If a sufficient factual basis exists, this Court then reviews the decision below for clear error. *Enviro Tech*, 371 F.3d at 370.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT REPORTS PREPARED FOR DEPARTMENT OF JUSTICE ATTORNEYS IN ANTICIPATION OF LITIGATION ARE PROTECTED BY THE WORK-PRODUCT PRIVILEGE.

A. The district court correctly held that the withheld documents are covered by the work-product privilege.

Documents are generally protected from disclosure under Exemption 5 of the FOIA if they would not "be routinely or normally disclosed upon a showing of relevance." *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 26 (1983) (internal quotation marks omitted); see 5 U.S.C. § 552(b)(5). Accordingly, any document covered by the work-product privilege is protected from disclosure under FOIA. See, *e.g., Grolier*, 462 U.S. at 20; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149, 154 (1975). In contrast to

civil litigation, the FOIA exemption is absolute and not subject to balancing. See *Grolier*, 462 U.S. at 26.

The work-product privilege protects any document "prepared in anticipation of litigation or for trial" by a party's "attorney" or "consultant." Fed. R. Civ. P. 26(b)(3)(A); see also *United States* v. *Smith*, 502 F.3d 680, 689 (7th Cir. 2007) ("The work-product privilege protects documents prepared by an attorney or the attorney's agent to analyze and prepare the client's case."). It "prevents a litigant from taking a free ride on the research and thinking of his opponent's lawyer," *Hobley* v. *Burge*, 433 F.3d 946, 949 (7th Cir. 2006), and "piggyback[ing] on the fact-finding investigation of their more diligent counterparts," *Sandra T.E.* v. *S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2009).

The district court correctly held that the documents at issue are work product shielded from disclosure by FOIA Exemption 5. The documents include working papers, draft and final reports, and e-mail communications prepared by technical consultants for Justice Department attorneys "in anticipation of litigation." SA5. These materials provided, among other things, "technical advice regarding the sources of PCBs at the Fox River Site," Dkt. 14, at 9, and were used in planning and conducting cases brought under CERCLA in relation to the Fox River site. See, *e.g.*, Dkt. 15, at 3. For example, as the Declaration of Randall Stone noted, the analyses and interim reports prepared were "used to inform the United States' civil

enforcement litigation strategy and [to] inform decisionmakers regarding proposed settlements and other litigation-related decisions." *Ibid.*

On appeal, API does not seriously dispute that the documents at issue are work product. Instead, API offers generalized assertions about the need to "pierce the veil of administrative secrecy" to advance the "profound national commitment to * * * open Government." See Br. 18-20. These contentions ask the Court to reconsider the balance already struck by Congress, which recognized "that legitimate governmental and private interests could be harmed by release of certain types of information, and therefore provided the specific exemptions under which disclosure could be refused." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks omitted).

API's request does not advance a "profound national commitment to * * * open Government." See Br. 18-20. Instead, API seeks to obtain under FOIA documents that it sought unsuccessfully in civil discovery when it opposed the government's proposed consent decree with Georgia-Pacific, another potentially responsible party. Order Approving Consent Decree at 1, *United States* v. *NCR Corp.*, No. 10-C-910, ECF No. 130, at 5, 9 (E.D. Wis.). In certain circumstances in civil discovery, in contrast to litigation under FOIA, a court may consider the interests of the party seeking discovery in determining the applicability of the work-product privilege. See *e.g.*, Fed. R. Civ. P. 26(b)(3)(A) (work-product privilege may be

overcome based need). But FOIA is not to "be used to supplement civil discovery." *United States.* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

2. API mistakenly urges that within the privileged documents is "un-privileged information," comprised of "factual material" that must be segregated and disclosed. Br. 26-29. The work-product privilege does not distinguish between factual and other portions of work product. See *Hickman* v. *Taylor*, 329 U.S. 495, 509-11 (1947) (applying work-product privilege to fact and opinion material contained in written files); *Smith*, 502 F.3d at 689 ("The work-product privilege protects *documents* prepared by an attorney or the attorney's agent to analyze and prepare the client's case.") (emphasis added); *Hobley*, 433 F.3d at 949 (work-product privilege "prevents a litigant from taking a free ride on the research *and* thinking of his opponent's lawyer") (emphasis added, internal quotation marks omitted). Courts have repeatedly recognized this fundamental characteristic of the work-product privilege in applying the privilege under FOIA Exemption 5. See, *e.g.*, *Pacific Fisheries, Inc.* v. *United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) ("[T]he attorney work-product privilege * * * shields both opinion and factual work product from discovery."); *Miccosukee Tribe of Indians of Fla.* v. *United States*, 516 F.3d 1235, 1263 (11th Cir. 2008) ("Factual attorney work product enjoys sweeping exemption protection because it is not 'routinely' or 'normally' discoverable through civil discovery"); *Tax Analysts* v. *IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) ("Any part of [a document] prepared in anticipation of litigation,

not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under Exemption 5.").

API mistakenly relies on decisions analyzing assertion of other privileges, such as the deliberative process privilege, under Exemption 5. See, *e.g.*, *ViroPharma Inc.* v. D*ep't of Health & Hum. Servs.*, 839 F. Supp. 2d 184, 195 (D.D.C. 2012) (deliberative process) (cited at Br. 26). As the D.C. Circuit explained in *Judicial Watch, Inc.* v. *Dep't of Justice,* 432 F.3d 366 (D.C. Cir. 2005), "the work-product doctrine simply does not distinguish between factual and deliberative material" and it is an "error" to "conflat[e]" different privileges. *Id.* at 371-72; see also *Nadler* v. *Dep't of Justice*, 955 F.2d 1479, 1492 (11th Cir. 1992) ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials.").[5]

B. The district court correctly held that the Department of Justice has not waived the work-product privilege.

Because the documents at issue were "prepared in anticipation of litigation," they are not "ordinarily" discoverable, Fed. R. Civ. P. 26(b)(3)(A), and FOIA Exemption 5 therefore bars their release. See *Weber Aircraft Corp.*, 465 U.S. at 801-02 (materials covered by Exemption 5 if a privilege "preclude[s] routine disclosure");

[5] In passing, API suggests that the district court was required to conduct an *in camera* review. Br. 27. *In camera* review, however, "is discretionary by its terms" and should only be invoked "when the issue before the District Court [can]not be otherwise resolved." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Because, as noted, segregability is not an issue for documents that constitute work product, *in camera* review could not have been necessary.

Grolier, 462 U.S. at 26 (no disclosure of documents not "routinely" or "normally" disclosed in litigation "upon a showing of relevance.").

Plaintiff offers a number of cursory arguments to suggest that the Justice Department has waived the work-product protection over these documents. See Br. 16-17, 20-25.

1. Plaintiff's first "waiver" argument was not presented in district court and is thus itself waived. *Zbaraz* v. *Hartigan*, 763 F.2d 1532, 1544 (7th Cir. 1985). That argument urges that the consultants who prepared the requested became "'testifying' experts" under Fed. R. Civ. P. 26(b)(4)(D) when government attorneys relied on their work. Br. 16-17. Even if it were not waived, the argument would be meritless. Fed. R. Civ. P. 26(b)(4)(D) does not concern the work-product privilege, or the disclosure of documents at all, which is instead covered by Fed. R. Civ. P. 26(b)(3)(A). Rule 26(b)(4) concerns deposing an opposing party's experts, making clear that a litigant may not "by interrogatories or deposition, discover facts known or opinions held by an expert" who was hired in anticipation of litigation but "who is not expected to be called as a witness." Indeed, one of API's own cases refers to this as the "Non-Testifying Expert Privilege" and distinguishes it from the work-product doctrine. See

In re Application of Chevron Corp., No. H-10-134, 2010 WL 2038826, at *3-*4 (S.D. Tex., May 10, 2010).[6]

2. API is on no firmer ground in arguing that the Justice Department waived the work-product privilege by making certain references to facts learned in preparation for litigation. Br. 20-21. API mistakenly urges that the work-product privilege "does not apply" when a document "is used by the agency in its dealing with the public." Br. 20. API points to five sentences extracted from two thirty-page briefs the Department submitted in support of Site-related consent decrees. See Br. 7-9. In those sentences, the government noted that current estimates of PCB discharge from a particular facility were in the range of 15%-20%. The five sentences did not cite a document or set of documents in support of this "rough estimate" derived from a "comprehensive ongoing assessment of the available data, see Dkt. 18-4, at 44; Dkt. 18-5, at 24; Dkt. 18-5 at 27, and only once referred to "a technical consultant" (Dkt. 18-4, at 25). A litigant's passing mention of its understanding of the facts of a situation does not waive the deliberative process privilege over all documents that helped the litigant reach that understanding.[7] The sole authority offered by API,

[6] *In re Application of Chevron Corp.*, No. H-10-134, 2010 WL 2038826, cited by API, distinguished this "Non-Testifying Expert Privilege" from the work-product doctrine, and concluded that the expert witnesses in that case be deposed because he had effectively testified "through affidavits." *Id.* at *3-*4.

[7] Before the district court, API raised a different, although related argument, that the government has waived the work-product privilege by "adopt[ing] or

Arthur Andersen & Co. v. *IRS*, 679 F.2d 254 (D.C. Cir. 1982), explained that the deliberative-process privilege applies to "pre-decisional" but not "post-decisional" communications, and noted that "even if [a] document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Id.* at 257-58 (quoting *Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980)). That observation has no bearing whatsoever on the analysis here.

3. API additionally argues that Exemption 5 cannot apply because it "[a]llows" the government an "[u]nfair [a]dvantage" (Br. 21), by making "selective" use of its own consultant's work, and the government therefore must disclose all related documents. Br. 21-23. To the extent that we can discern API's theory, it is mistaken.

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incorporat[ing]" the documents "into an agency policy." SA6. API has not properly raised that related argument before this Court and cannot do so for the first time in its reply brief. See *Citizens Against Ruining the Env't* v. *EPA*, 535 F.3d 670, 675 (7th Cir. 2008). In any event, the argument lacks merit. First, that rule is a limitation on the deliberative-process privilege in FOIA cases. There is no basis for applying it to the work-product privilege. See *Fed. Open Market Comm. of the Fed. Reserve* v. *Merrill*, 443 U.S. 340, 360 n.23 (1979); see also *Sears*, 421 U.S. at 160-61; *Wood* v. *FBI*, 432 F.3d 78, 84 (2d Cir. 2005). Second, even if that rule could be applied to the work-product privilege, the district court correctly found that the government's limited use of facts allegedly learned from some of the documents now at issue is far removed from having "adopted" or "incorporated" the privileged documents into final agency policy. SA6-7. Compare *Sears*, 421 U.S. at 140-42, 148-54 (general counsel's memorandum serving as final adjudication of administrative action adopted by agency as its "final opinion * * * made in the adjudication of cases").

API's arguments about "fairness" do not appear to concern whether the documents at issue are "would be routinely or normally disclosed upon a showing of relevance," the inquiry for FOIA exemption 5. *Grolier*, 462 U.S. at 26. API's appeals to "unfair advantage" are litigation-specific concerns that, in a particular case, might permit a party to overcome the qualified privilege, see *e.g.*, Fed. R. Civ. P. 26(b)(3)(A) (work-product privilege may be overcome based need), or serve as a basis for implied waiver, see Fed. R. Evid. 502(a) and Committee Notes (concept of implicit waiver "reserved for those unusual situations in which fairness requires a further disclosure * * * to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary"). These case-specific concerns are a basis for requiring discovery in certain civil litigation. But they have no relevance in determining whether, for purposes of FOIA Exemption 5, the material is routinely discoverable. See *Grolier*, 462 U.S. at 26-27. FOIA Exemption 5 is not subject to case-specific or plaintiff-specific balancing.

The D.C. Circuit's decision in *Rockwell Int'l Corp.* v. *Dep't of Justice*, 235 F.3d 598 (D.C. Cir. 2000), is instructive. There, a FOIA plaintiff argued that by "relying on" attachments to certain documents "to 'put [] to rest' criticisms," the Department of Justice "waived the work-product privilege related to the same subject matter." *Id.* at 605. The D.C. Circuit explained that various cases concerning waiver of the work-product privilege — including *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), a case

on which API relies here (Br. 22) — do not require disclosure of documents under FOIA, because they do not concern "whether the documents would be routinely or normally disclosed upon a showing of relevance' by a party in litigation with the agency." *Rockwell*, 235 F.3d at 606 (internal quotation marks omitted) (quoting *Grolier*, 462 U.S. at 26). While "particular circumstances" of litigation may make disclosure in that litigation "necessary to protect the adversary system," the court explained, it "does not mean that the documents in those cases [a]re routinely or normally disclosable upon a showing of relevance," "[t]he test under Exemption 5." *Ibid.* (internal quotation marks omitted).

Similarly, in *Williams & Connolly* v. *SEC*, 662 F.3d 1240 (D.C. Cir. 2011), the D.C. Circuit addressed a FOIA request of all notes taken by the Securities and Exchange Commission of two potential witnesses in a case. *Id.* at 1242. The FOIA plaintiff argued that because the SEC had disclosed 11 of the 114 sets of notes in a prior trial, the remaining notes must be made public. The court rejected that argument, reasoning, among other things, that the "notes not turned over" are "not ordinarily discoverable in civil proceedings." *Id.* at 1244.

FOIA "does not draw distinctions based on who is requesting the information, or for what purpose." *Williams & Connolly*, 662 F.3d at 1245. And API's arguments do not bear on the question relevant to FOIA, whether the documents "would be routinely or normally disclosed upon a showing of relevance." *Grolier*, 462 U.S. at 26.

To the extent that API is urging that it should have received the documents at issue in prior discovery or may need them in future litigation, those concerns are not relevant to FOIA. As the Supreme Court has explained, "it is not sensible to construe the [FOIA] to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." *Sears,* 421 U.S. at 149 n.16.

In any case, API's "waiver" argument fails at every turn. Even in the arena of civil litigation, it has been long understood that "[t]he purposes of the work product privilege * * * are not inconsistent with selective disclosure — even in some circumstances to an adversary." *Williams & Connolly*, 662 F.3d at 1244 (quoting *In re Sealed Case*, 676 F.2d at 818). Thus, even "quoting portions" of some documents does not waive the work-product privilege over the rest of that material unless it is "inconsistent with a desire to keep the rest secret." *Rockwell Int'l Corp.*, 235 F.3d at 605.

And, as relevant here, it is well established that under FOIA exemption 5, "the release of certain documents waives FOIA exemptions only for those documents released." *Mobil Oil Corp* v. *EPA*, 879 F.2d 698, 700 (9th Cir. 1989); see, *e.g.*, *Williams & Connolly*, 662 F.3d at 1244-45 (release of some interview notes with witnesses does not require release of all interview notes with those witness). As this Court has explained with regard to another FOIA exemption, by "exercising its discretion to

make public some classified documents," the government "does not waive any right it has" under FOIA "to withhold other properly classified documents of a similar nature." *Stein* v. *Dep't of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981). Indeed, such a broad waiver theory would "impinge on executive discretion" and could "deter agencies from voluntarily honoring FOIA requests," which may reveal selectively documents pertaining to a subject area. *Williams & Connolly*, 662 F.3d at 1245.

Moreover, API's argument is premised on the idea that when the Justice Department noted its understanding of PCB discharge when requesting approval of consent decrees, it "disclose[d]," or "reveal[ed]" the documents that helped it reach that understanding. Br. 21, 22, 23. That is mistaken. As noted, over the course of two briefs, the Justice Department included a total of five sentences alluding to current estimates of a particular PCB discharge. The government did not submit to the court any of the documents now at issue. Indeed, nowhere in these five sentences did the government even identify a specific document or set of documents upon which it was relying

Finally, even were this a discovery dispute in civil litigation, API's waiver argument would still be at odds with Fed. R. Evid. 502(a). That rule provides that a litigant waives the work-product privilege over non-public materials only if it intentionally waives the privilege over certain materials and the non-public materials "ought in fairness" be considered alongside the released material. Fed. R. Evid.

502(a). As the committee notes indicate, this is "reserved for those unusual situations in which fairness requires a further disclosure * * * to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." But here, the district court found that "it cannot be argued that the government's disclosures were done selectively or that it had cherry-picked certain data in order to create a misleading impression." SA9. Indeed, in the prior case where API sought these documents, the court noted that the 15% - 20% figured offered by the government had not "come out of left field" and was supported by multiple "estimates in the record, and is consistent with the objectors' own expert." Order Approving Consent Decree at 1, *NCR Corp.*, No. 10-C-910, ECF No. 130, at 5. While API may question the basis of the government's representations, its questions would not create subject-matter waiver even in ordinary civil litigation.[8]

[8] API takes as "instructive" one district court decision, *Goodrich Corp.* v. *United States EPA,* 593 F. Supp. 2d 184 (D.D.C. 2009). *Goodrich* did not consider whether the materials at issue were "routinely or normally" discoverable. *Grolier*, 462 U.S. at 26. Moreover, as the district court in this case noted, *Goodrich* relied on the now-repudiated subject-matter waiver doctrine that "disclosure of some attorney work product may result in a waiver of other attorney work product." *Id.* at 191. And in any case, the *Goodrich* analysis itself demonstrates why there has been no waiver here. In *Goodrich*, the district court's deeply fact-intensive analysis turned on a party's having claimed waiver only "for a single document" where the privilege holder has shared the "gist of the document" including the final results of the model contained therein. *Id.* at 191-92. In stark contrast, API seeks exactly what the *Goodrich* court said it was not addressing — "an open-ended list of all documents related to a certain subject matter." *Id.* at 192. And the government here has not disclosed anything other than

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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August 15, 2012

its rough understanding of PCB discharge, which was based on, amongst other things, certain technical work.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,547 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Adam Jed
ADAM C. JED

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system, which constitutes service on all parties under the Court's rules.

s/ Adam Jed
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